

HOUSE BILL REPORT

SHB 1072

As Passed House
February 14, 1997

Title: An act relating to interception, transmission, recording, or disclosure of communications.

Brief Description: Regulating interception of communications.

Sponsors: By House Committee on Law & Justice (originally sponsored by Representatives Sterk, Sheahan, Hickel and Delvin).

Brief History:

Committee Activity:

Law & Justice: 1/21/97, 1/29/97 [DPS].

Floor Activity:

Passed House: 2/14/97, 97-0.

HOUSE COMMITTEE ON LAW & JUSTICE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Sheahan, Chairman; McDonald, Vice Chairman; Sterk, Vice Chairman; Costa, Ranking Minority Member; Constantine, Assistant Ranking Minority Member; Carrell; Cody; Kenney; Lambert; Lantz; Radcliff and Sherstad.

Staff: Edie Adams (786-7180).

Background: A "pen register" is a device attached to a telephone line that records the phone numbers dialed from that telephone line. A "trap and trace device" is a device attached to a telephone line that records the telephone number of all calls coming into that telephone line. Federal and state law regulate the installation and use of these devices.

FEDERAL LAW: Pen registers and trap and trace devices are not subject to the Fourth Amendment to the United States Constitution, which generally prohibits unreasonable searches and seizures without a court order based on probable cause. However, federal law places restrictions on the use of these devices.

Federal law generally prohibits the installation and use of a pen register or trap and trace device without a court order. A court may authorize the installation and use of

a pen register or trap and trace device if the information likely to be obtained is relevant to an ongoing criminal investigation.

A designated law enforcement officer may install and use a pen register or trap and trace device without court authorization if

- (1) the officer reasonably determines that (a) an emergency exists involving immediate danger of death or serious bodily injury to a person, or conspiratorial activities characteristic of organized crime; (b) the pen register or trap and trace device needs to be installed before an order authorizing the installation can be obtained; and (c) there are grounds on which a court order for installation could be obtained; and
- (2) the officer seeks a court order authorizing the installation within 48 hours.

STATE LAW: The installation and use of a pen register is subject to the right to privacy protections contained in the Washington Constitution. In *State v. Gunwall*, the Washington Supreme Court ruled that the installation and use of a pen register without valid legal process violates the Washington Constitution's right to privacy. In addition, the court concluded that pen registers are private communications— under the Privacy Act, and therefore may not be used except as specifically authorized by that statute.

The Privacy Act restricts the interception or recording of private communications or conversations. As a general rule, it is unlawful for any person to intercept or record a private communication or conversation without first obtaining the consent of all persons participating in the communication or conversation. There are limited exceptions to this general rule that allow the communication or conversation to be intercepted and recorded when only one party consents. The Privacy Act allows a court to order interceptions of communications without the consent of any party to the communication, only in cases involving danger to national security or a human life, or imminent arson or riot.

Trap and trace devices are not private communications— under the Privacy Act. In *State v. Riley*, the Washington Supreme Court upheld the use of evidence obtained by law enforcement officers who installed a trap and trace device without a court order. The court distinguished the holding in *Gunwall* with respect to pen registers, finding that a trap and trace device is not a private communication because it does not affect more than one person and does not involve the potential of multiple invasions of privacy.

Summary of Bill: The Privacy Act is amended to provide that no person may install or use a pen register or trap and trace device without prior court authorization except as specifically authorized under the act or as currently authorized by the Privacy Act.

A pen register or trap and trace device may be installed and used by law enforcement agencies pursuant to an authorizing court order or in certain emergency situations.

COURT AUTHORIZATION: A law enforcement officer may apply to the superior court for an order authorizing the installation and use of a pen register or a trap and trace device. The court must authorize the installation and use of the device if the court finds (1) that the information likely to be gained is relevant to an ongoing criminal investigation; and (2) there is probable cause to believe that the device will lead to evidence of a crime, contraband, fruits of crime, things criminally possessed, weapons, or things by means of which a crime has been committed, or reasonably appears about to be committed.

The court order must specify the identity of the person registered to the affected line, the identity of the subject of the criminal investigation, the number and physical location of the affected line, and a statement of the offense to which the information likely to be obtained relates.

The court order is valid for a period not to exceed 60 days. A 60-day extension may be ordered based upon a new application and a court finding of appropriate grounds. The existence of the pen register or trap and trace device may not be disclosed by any person except by court order.

Courts must submit information on the number and characteristics of authorizations issued for the installation and use of a pen register or trap and trace device in an annual report to the Administrator for the Courts.

If requested by the law enforcement officer and directed by the court, providers of wire or electronic communication services and other appropriate persons must provide the law enforcement officer authorized to install a pen register or trap and trace device, all information, facilities, and technical assistance necessary to complete the installation. A person who provides assistance must be reasonably compensated for the person's services, and is immune from civil or criminal liability for any information, facilities, or assistance provided in good faith reliance on a court order authorizing the installation.

EMERGENCY SITUATIONS: A pen register or trap and trace device may be installed without prior court authorization if:

- (1) A law enforcement officer and a prosecuting attorney or deputy prosecuting attorney jointly and reasonably determine that there is probable cause to believe that: (a) an emergency exists involving immediate danger of death or serious bodily injury to any person; (b) the pen register or trap and trace device needs to be installed before an authorizing court order can be

obtained; and (c) grounds exist upon which an authorizing court order could be entered; and

- (2) A court order approving the use of the pen register or trap and trace device is obtained within 48 hours after its installation.

In the absence of an authorizing court order, the use of a pen register or trap and trace device must immediately terminate once the information sought is obtained, when the application for the order is denied, or when 48 hours have elapsed since the installation, whichever is earlier. If a court order approving the installation is not obtained within 48 hours, any information obtained from the installation is not admissible as evidence in any legal proceeding.

A law enforcement agency must file a monthly report with the Administrator for the Courts indicating the number of authorizations made by the agency without a court order, the date and time of each authorization, and whether a subsequent court authorization was granted. An officer who knowingly installs a pen register or trap and trace device without court authorization and who does not seek court authorization within 48 hours is guilty of a gross misdemeanor.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill only authorizes the interception of telephone numbers, not conversations. These devices are tools needed for law enforcement, especially in investigating sophisticated and loosely organized criminal enterprises. Washington is the only state that doesn't permit law enforcement to use these devices. The bill provides standards that are more restrictive than the federal standard for the authorization and use of pen registers and trap and trace devices. This is not the only instance where a judge is authorized to issue a search warrant on less than probable cause.

Testimony Against: The bill allows a person's private affairs to be invaded without a showing of probable cause. The bill is loosely written and requires only paltry information in order to obtain an authorization to use one of these devices. People use their telephones for a variety of reasons, including conducting banking transactions, and these devices will enable law enforcement to obtain a substantial dossier on people, including confidential bank account information.

Testified: Representative Sterk, prime sponsor; Tim Schellberg, Washington Association of Sheriffs and Police Chiefs (pro); Dan LaRoche, Douglas County

Sheriff (pro); Tom McBride, Washington Association of Prosecuting Attorneys (pro); Pat Sainsbury, Chief Deputy, Fraud Division, King County Prosecuting Attorney's Office (pro); Jerry Sheehan, American Civil Liberties Union (con); Jeff Steinborn, Washington Association of Criminal Defense Lawyers (con); and Sherry Appleton, Washington Defenders Association and Washington Association of Criminal Defense Lawyers (con).